

UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT

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IN RE:)	CASE NO.	04-33116 (LMW)
)		
MELISSA J. FLYNN,)	CHAPTER	7
)		
DEBTOR.)		
-----)		
LISA BISHOP,)	ADV. PRO. NO.	04-3130
)		
PLAINTIFF)	DOC. I.D. NO.	1
)		
vs.)		
)		
MELISSA J. FLYNN,)		
)		
DEFENDANT.)		
-----)		

APPEARANCES

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MEMORANDUM OF DECISION

Lorraine Murphy Weil, United States Bankruptcy Judge

The matter before the court is the above-referenced plaintiff's (the "Plaintiff") complaint seeking a determination that \$14,972 of past due rent and/or use and occupancy charges (collectively, the "Debt") allegedly owing to the Plaintiff is exempt from discharge in this chapter

7 case pursuant to 11 U.S.C. § 523(a)(2)(A). This matter is a core proceeding within the purview of 28 U.S.C. § 157(b). The court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. § 1334 and that certain order dated September 21, 1984 of the District Court (Daly, C.J.).¹

I. PROCEDURAL BACKGROUND

A. The Chapter 7 Case

The above-referenced debtor/defendant (the “Debtor”) commenced this chapter 7 case by voluntary petition (Case Doc. I.D. No. 3, the “Petition”) filed on July 1, 2004 (the “Petition Date”).² The Petition was filed in conjunction with a complete set of schedules and a statement of financial affairs. (Case Doc. I.D. No. 3.) Schedule B totaled the value of the Debtor’s personal property at \$20,017.00, including two automobiles, various personal items, and a \$1,200 security deposit held by the Plaintiff related to the rental apartment (the “Apartment”) at issue in the adversary proceeding. Schedule D totaled the Debtor’s secured claims at \$21,767.84. Schedule E totaled the Debtor’s unsecured priority claims at \$3,055.58. Schedule F totaled the Debtor’s unsecured nonpriority claims at \$99,650.72, approximately half of which are outstanding student loans totaling over \$40,000.00. Finally, Schedule I stated the Debtor’s current monthly income at \$2,698 while Schedule J stated the Debtor’s current monthly expenses at \$2,895.

September 28, 2004 was set as the last date upon which complaints seeking determinations of nondischargeability of claims, including under Bankruptcy Code § 523(a)(2)(A), could be timely

¹ That order referred to the “Bankruptcy Judges for this District” *inter alia* “all proceedings . . . arising under Title 11, U.S.C., or arising in . . . a case under Title 11, U.S.C. . . .”

² Citations herein to the docket of the above-captioned chapter 7 case appear in the following form: “Case Doc. I.D. No. ____.” Citations herein to the docket of this adversary proceeding appear in the following form: “Adv. Pro. Doc. I.D. No. ____.”

filed. (Case Doc I.D. No. 4.) On September 1, 2004, the Plaintiff filed a motion with the court to compel the Debtor to vacate the Apartment. (*See* Case Doc. I.D. No. 9.) After a hearing on the Plaintiff's motion, this court modified the automatic stay on October 20, 2004 to permit the Plaintiff to take possession of the Apartment. (*See* Case Doc. I.D. No. 14.) The chapter 7 trustee filed a report of no distribution on September 8, 2004 (Case Doc. I.D. No. 10) and a chapter 7 discharge of the Debtor was issued on November 24, 2004 (Case Doc. I.D. No. 18, the "Discharge").

B. The Adversary Proceeding

On September 1, 2004, the Plaintiff timely filed a complaint (Adv. Pro. Doc. I.D. No. 1, the "Complaint") against the Debtor seeking a declaration that the Debt is nondischargeable in this case pursuant to Section 523(a)(2)(A), thus initiating this adversary proceeding. On January 5, 2005, the court set a trial date of May 9, 2005 to litigate the Plaintiff's Section 523(a)(2)(A) nondischargeability claim. (*See* Adv. Pro. Doc. I.D. No. 13.) Prior to trial, on March 23, 2005, the Plaintiff moved to compel the Debtor to respond to the Plaintiff's interrogatories and discovery requests. (*See* Adv. Pro. Doc. I.D. No. 15.) That motion ultimately was denied by the court (Dabrowski, C.J.) for failure to prosecute. (*See* Adv. Pro. Doc. I.D. No. 18.)

The trial (the "Trial") took place on May 9, 2005. Both the Plaintiff and the Debtor testified at the Trial and the Plaintiff introduced documentary evidence into the record. (*See* Plaintiff's Exhibits A-M.) The parties both filed post-trial briefs (*see* Adv. Pro. Doc. I.D. Nos. 24 & 25, "Plaintiff's Brief," Adv. Pro. Doc. I.D. No. 23 (Debtor's brief)) and, at the request of the court (*see* Adv. Pro. Doc. I.D. No. 27), filed supplemental briefs (*see* Adv. Pro. Doc. I.D. No. 29, "Plaintiff's Supplemental Brief," Adv. Pro. Doc. I.D. No. 30, "Debtor's Supplemental Brief"). This matter now is ripe for decision.

For the reasons set forth below, the court concludes that the prepetition portion of the Debt is subject to the Discharge entered in this Chapter 7 case, but any use or occupancy charges incurred postpetition are not affected by the Discharge.

II. FACTS

The Debtor graduated from the University of Connecticut in 2001 with an undergraduate degree in molecular and cell biology. The Plaintiff and her husband purchased a two family house known as 30 Bishop Lane, Cheshire, CT (the “House”) in 2001. Approximately two years later, in August of 2003, the Plaintiff, as lessor, entered into a one-year written lease agreement (*see* Plaintiff’s Exhibit A, the “Lease”) with the Debtor, as lessee, for use of the Apartment in the Plaintiff’s House. The Plaintiff did not ask the Debtor to fill out a rental application, ask for proof of employment and income, or request the name of the Debtor’s previous landlords.³

It is uncontested that the Debtor paid the full rental amount of \$1,200 per month provided for in the Lease for the months of August and September of 2003. In October of 2003, the Debtor paid the Plaintiff \$1,050 of the \$1,200 monthly rent. However, early in November of 2003 the Debtor notified Plaintiff that she had lost her job and consequently would be unable to pay November’s rent. The Debtor told the Plaintiff that she was looking for another job and, as soon as she secured one, would pay the Plaintiff the amount of rent owed. Over the next several months, the Debtor repeatedly failed to pay her monthly rental obligations to the Plaintiff. During that time the Debtor was in regular communications with the Plaintiff, promising to pay her rental arrearage to the Plaintiff as soon as she secured a new job. Despite the Debtor’s repeated inability to pay the

³ The Debtor did testify that she orally gave the Plaintiff a few names to use as references, one of whom worked with the Debtor at the time and was known by the Plaintiff. (*See* Trial Tr. 63:8-63:16, May 9, 2005.)

monthly rent, the Plaintiff decided not to commence eviction proceedings with the hope that the Debtor indeed would find a new job and pay the rental arrearage. (*See* Trial Tr. 20:15-20:24, May 9, 2005.)

The foregoing pattern continued through March of 2004, when the Debtor made two payments to the Plaintiff: one in the amount of \$100 on March 14, 2004 and another in the amount of \$680 on March 28, 2004.⁴ Additionally, the Debtor proposed a written repayment schedule in March of 2004, whereby the Debtor would make payments approximately every two weeks to the Plaintiff in varying amounts. However, after the above-referenced two payments of \$100 and \$680, the Debtor failed to abide by the repayment schedule and made no further payments. Shortly thereafter, in April 2004, the Debtor provided email notice to the Plaintiff that she was “broke,” could no longer afford the \$1,200 a month rent and that she would need to find a cheaper apartment, move out, and begin to pay off her rental arrearage. (*See* Trial Tr. 22:17-22:18, May 9, 2005; Plaintiff’s Exhibit M.)

In May of 2004, the Plaintiff commenced a civil action in state housing court against the Debtor for the past due rent under the Lease. However, the Plaintiff failed to return the subject complaint to the court in a timely manner. On June 10, 2004 the Plaintiff served the Debtor with a Notice To Quit (the “Notice To Quit”). Then, on July 1, 2004, the Debtor commenced this chapter 7 case. As noted above, on October 20, 2004 this court modified the automatic stay in this case to permit the Plaintiff to take possession of the Apartment. In November of 2004, the Plaintiff

⁴ The Plaintiff testified at the Trial that her understanding was that the Debtor had secured a new job in March of 2004 that enabled her to start making payments to the Plaintiff for rent. The Debtor, however, testified that she only starting working again in October of 2004. Since the Plaintiff has failed to adequately develop the record regarding the Debtor’s employment status from March of 2004 through October of 2004, the court will not draw a conclusion on the matter.

commenced a summary process action against the Debtor in respect of the Apartment in state housing court. The Debtor moved to dismiss that summary process action as stale (on the grounds that the Notice To Quit was given to the Debtor over five months earlier in June, 2004). A hearing to decide the Debtor's motion was set for December 7, 2004. Before the hearing date, however, the Debtor and the Plaintiff entered into a stipulation whereby the Debtor agreed to vacate the Apartment by November 26, 2004. The Debtor complied with that stipulation.

Plaintiff now requests the court to determine that the rental arrearage and any additional use and occupancy charges accrued by the Debtor are nondischargeable under Bankruptcy Code § 523(a)(2)(A). Additionally, the Plaintiff requests reasonable legal fees, claiming that the Debtor acted in bad faith by failing to disclose to the Plaintiff her prior criminal history.⁵

III. ANALYSIS

A. Nondischargeability under Bankruptcy Code § 523(a)(2)(A)

1. Legal Standard

Bankruptcy Code § 523(a)(2)(A) excepts from discharge “any debt – for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained, by – false pretenses, a false representation, or actual fraud” 11 U.S.C.A. § 523(a)(2)(A) (West 2006). To establish nondischargeability under Bankruptcy Code § 523(a)(2)(A), the Plaintiff must prove the following: (1) the Debtor made representations; (2) knowing them to be false; (3) with the intent and purpose of deceiving the Plaintiff; (4) upon which representations the Plaintiff actually and

⁵ The Debtor was thirty-six years old at the time of the Trial. (*See* Trial Tr. 46:23, May 9, 2005.) The Debtor was convicted of embezzlement when she was nineteen years old (*see* Trial Tr. 48:16-49:7, May 9, 2005) and theft of cable television services (*see* Trial Tr. 50:4-50:20, May 9, 2005).

justifiably relied; and (5) which proximately caused the alleged loss or damage sustained by the Plaintiff. *See, e.g., Pierce v. Pierce (In re Pierce)*, 323 B.R. 21, 27 (Bankr. D. Conn. 2005); *Rosenblit v. Kron (In re Kron)*, 240 B.R. 164, 165 (Bankr. D. Conn. 1999) (Krechevsky, J.). The plaintiff must prove each element by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 291 (1991). To be actionable under Section 523(a)(2)(A), the debtor's conduct "must involve moral turpitude or intentional wrong; mere negligence, poor business judgment or fraud implied in law (which may exist without imputation of bad faith or immorality) is insufficient." *Kron*, 240 B.R. at 165-66. Moreover, exceptions to discharge must be strictly construed in favor of the debtor in order to effectuate the fresh start policy of bankruptcy. *See id.* at 165.

A representation by a debtor that she intends to pay the debt is a false representation only if the debtor does not in fact have that intent at the time of the representation. Because intent to defraud is rarely proven by direct evidence, this court adopts a "totality of the circumstances" approach to determine if there is sufficient circumstantial evidence for the court to infer that the debtor intended not to pay the debt at the time she incurred the debt. *See Citibank USA, N.A. v. Spring (In re Spring)*, No. 04-3007, 2005 WL 588776, at *4 (Bankr. D. Conn. March 7, 2005).

2. Application of Law to Fact

The Debt in this case can be divided into two categories: (1) rent and/or use and occupancy charges allegedly owed by the Debtor to the Plaintiff that arose prepetition, and (2) charges potentially owed by the Debtor to the Plaintiff for continued use and occupancy of the Apartment that arose postpetition. Each category is discussed in turn below.

a. Prepetition Debt

The stated term of the Lease between the Plaintiff and the Debtor was from August 2, 2003 through August 1, 2004. (*See* Plaintiff's Exhibit A.) However, it is uncontested that the Lease terminated prepetition pursuant to the Notice To Quit. (*See* Trial Tr. 6:19-6:24, Oct. 20, 2004.) The foregoing does not preclude the possibility that the Debtor might owe the Plaintiff charges for her continued use and occupancy of the Apartment through July 1, 2004 when the Plaintiff filed her chapter 7 petition.

With regards to the prepetition debt, the Complaint seeking nondischargeability can be construed to assert two claims: (1) the Debtor made false representations that she would pay off the delinquent rent owed to the Plaintiff when the Debtor found a new job, and (2) the Debtor made false representations that she would vacate the Plaintiff's apartment and pay off the delinquent rent owed to the Plaintiff as soon as the Debtor found a cheaper place to live.

i. Debtor's Promise To Find a New Job

In November 2003, when the Debtor first notified the Plaintiff that she had lost her job and consequently would be unable to pay the \$1,200 monthly rent, the Debtor promised the Plaintiff that she would pay her rental arrearage once she secured another job. The Plaintiff now challenges that promise and similar promises made through March of 2004 as false representations falling within the purview of Section 523(a)(2)(A).

The first two elements of the five-part test for establishing a case of nondischargeability under Section 523(a)(2)(A) require the court to determine whether (1) the Debtor made a representation, (2) that she knew was false. *See Kron*, 240 B.R. at 165. It is uncontested that the first element of the test is satisfied; the Debtor made multiple representations to the Plaintiff from

November of 2003 through March of 2004 that she intended to pay the delinquent rental balance when the Debtor secured a new job. The second element of the five-part test, however, requires the Plaintiff to prove by a preponderance of the evidence that these representations of intent were false *and* that the Debtor knew they were false at the time she made them. *See id.* *See also Smith v. Schwartz (In re Schwartz & Meyers)*, 130 B.R. 416, 422 (Bankr. S.D.N.Y. 1991). Plaintiff essentially offers two arguments to establish this element. First the Debtor never earned more than \$880 per week and therefore could not possibly have repaid the rental arrearage. Second, the Debtor's criminal record would substantially impair her ability to secure the high-paying job necessary to fund her repayment obligation. The Plaintiff argues that either or both facts (of which the Debtor had knowledge) reveals the Debtor's reckless disregard of the truth.

The court is not persuaded by the Plaintiff's arguments. The Debtor testified that she attempted to follow through on her promise to the Plaintiff by interviewing with various potential employers in her chosen field. (*See* Trial Tr. 43:8-44:9, May 9, 2005.) As noted above, the Debtor has a degree in molecular and cell biology. The fact that the Debtor had not previously held a job paying more than \$880 per week does not mean that she was not qualified to do so. While her criminal record was unlikely to help in her job search, the court is not persuaded that such record disqualified the Debtor from such an opportunity. Accordingly, the Plaintiff's arguments do not prove by a preponderance of the evidence that the Debtor's representations of intent were false or made with a reckless disregard of the truth at the time she made them to the Plaintiff.⁶

⁶ In the alternative, Plaintiff's complaint might be construed to claim that the Debtor's failure to disclose her criminal record was a false pretense or false representation under Section 523(a)(2)(A). While it is true that "a debtor's silence regarding a material fact can constitute a false representation actionable under Section 523(a)(2)(A)," *Fed. Deposit Ins. Corp. v. Roberti (In re Roberti)*, 201 B.R. 614, 627 (Bankr. D. Conn. 1996) (Shiff, J.)(quoting *Caspers v. Van Horne*

ii. Debtor's Promise to Move Out Without Eviction

The second argument advanced by the Plaintiff is that the Debtor's promise in April of 2004 to find a cheaper apartment, move out and begin to pay Plaintiff for the rental arrearage was also a false representation falling within the purview of Section 523(a)(2)(A). For many of the same reasons articulated in the previous section, the court is not persuaded by the Plaintiff's argument.

As in the previous section, the Plaintiff has failed to satisfy the second element of the five-part test for proving nondischargeability under Section 523(a)(2)(A) which requires a creditor to prove by a preponderance of the evidence that the Debtor knew her representations of intent to the Plaintiff were false at the time she made them. *See Kron*, 240 B.R. at 165. *See also Schwartz*, 130 B.R. at 422. The only argument that the Plaintiff appears to advance to support that proposition is the fact that the Debtor made her promise to move out (when she found a cheaper place to live) in April of 2004 and did not vacate the apartment until November 26, 2004. While the fact that the Debtor remained in the Plaintiff's property for about seven months after she first promised to move out raises a suspicion of false representation, the Plaintiff offers no further evidence to prove that the Debtor did not intend to vacate the Apartment except through an eviction. For example, the Plaintiff failed to provide evidence showing that the Debtor never looked for cheaper apartments or failed to make other efforts to attempt to follow through on her promise. Accordingly, the court is

(*Matter of Van Horne*), 823 F.2d 1285, 1288 (8th Cir. 1987)), the omitted fact must be a *material one*; a fact "touching upon the essence of the transaction." *Id.* For the reasons discussed above, the court concludes that the Debtor's criminal record was not material here. Moreover, that criminal record was no more material when the Debtor was in default than it was at the inception of the Lease and the Plaintiff did not even ask the Debtor to fill out a lease application.

not persuaded that the Debtor's representation of her intent to vacate the Apartment without an eviction was false when made.⁷

b. Postpetition Debt

Although the Lease terminated before the Petition Date, the Debtor remained in the Apartment from July 1, 2004 (the Petition Date) through November 26, 2004. As a result, the Debtor may be liable to the Plaintiff for use and occupancy charges for that time. However, both parties concede in their supplemental briefs that any potential use and occupancy charges arising during the postpetition period is a postpetition debt and therefore not affected by the Discharge. (See Plaintiff's Supplemental Brief at 2; Debtor's Supplemental Brief at 1, 3-4.) The court does not have jurisdiction to liquidate a postpetition debt of a chapter 7 debtor when that issue can have no effect on the administration of the chapter 7 case.⁸ Cf. *Publicker Indus. Inc. v. United States (In re Cuyahoga Equip. Corp.)*, 980 F.2d 110, 114 (2d Cir. 1992) (explaining how a proceeding is "related to" a bankruptcy within the purview of 28 U.S.C. § 1334(b) only if resolution of the proceeding would have any "conceivable effect" upon the estate being administered in bankruptcy or any "significant connection" with the bankruptcy estate). Moreover, there is a specialized state court

⁷ In her post-trial brief, the Plaintiff invites the court to infer a "tendency" to commit fraud from the Debtor's criminal record. (See Plaintiff's Brief 6.) Rule 404(b) of the Federal Rules of Evidence precludes this court from doing so. Fed. R. Evid. 404(b) (West 2005) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith."). However, this rule does not preclude the court from taking the Debtor's criminal record into account in determining her credibility. In that regard, the court concludes that the Debtor's credibility is not materially affected by the Debtor's seventeen-year-old embezzlement conviction and her theft of cable services conviction.

⁸ The postpetition use and occupancy debt (if any) did not benefit the chapter 7 estate and is not an expense of administration. See 4 Alan N. Resnick & Henry J. Sommer, *Collier on Bankruptcy* ¶ 503.06[3][b] (15th ed. rev. 2005).

available. *See generally* Conn. Gen. Stat. Title 47a, Chapter 874. Accordingly, this court will leave liquidation of any postpetition debt for use and occupancy to the state court.

3. Attorneys' Fees and Costs

In addition to seeking an order from this court that the Debtor's rental arrearage and / or use and occupancy charges are nondischargeable, the Plaintiff has requested reasonable attorney's fees and expenses in the Complaint. While there is no general right to attorney's fees in bankruptcy actions, such fees may be awarded in accordance with state law. *BankBoston, N.A. v. Sokolowski (In re Sokolowski)*, 205 F.3d 532, 535 (2d Cir. 2000). However, where the litigated issues are "peculiar to federal bankruptcy law, attorney's fees will not be awarded absent bad faith or harassment by the losing party." *Id.* (citing *Fobian v. Western Farm Credit Bank (In re Fobian)*, 951 F.2d 1149, 1153 (9th Cir. 1991)). In this case, the Plaintiff's attempt to except from discharge certain debts allegedly owed by the Debtor turns solely on issues arising under the Bankruptcy Code. Accordingly, the Plaintiff is required to demonstrate "bad faith or harassment" by the Debtor. *Id.* The court is not persuaded that the Plaintiff has met this burden.

Moreover, the Plaintiff's claim for attorney's fees fails because the Plaintiff has not properly pled that claim. Rule 7008(d) of the Federal Rules of Bankruptcy Procedure requires that a request for attorney's fees be pleaded as a separate claim in a complaint. However, the Plaintiff refers to said claim only in the prayer for relief. (*See* Complaint at 3.) "A general demand for attorney's fees in the prayer for relief does not state a proper claim for attorney's fees, as required by [Rule 7008(b)]." *In re Spring*, 2005 WL 588776, at *6. *See also Hartford Police F.C.U. v. DeMaio (In re DeMaio)*, 158 B.R. 890, 892 (Bankr. D. Conn. 1993) (Krechevsky, J.) ("Statements made in a

prayer are insufficient to satisfy the requirement that attorney's fees be stated as a *claim*.”)
(emphasis in original).

IV. CONCLUSION

For the reasons stated above, the court concludes that the Plaintiff's claim against the Debtor for prepetition rent and/or use and occupancy is discharged but that the Debtor's postpetition debt (if any) to the Plaintiff for use and occupancy is not discharged. Additionally, the court denies the Plaintiff's claim for reasonable legal fees. Judgment will enter accordingly.

Dated: February 9, 2006

BY THE COURT


Lorraine Murphy Weil
United States Bankruptcy Judge